

FILED
2009 MAR 10 P 4:50
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS N. STEWART, III - #88128
ATTORNEY AT LAW
369 BLUE OAK LANE, 2nd FLOOR
CLAYTON, CA 94517
TELEPHONE (925) 672-8452
TELEFAX (925) 673-1729
Attorneys for Rick Futia

E-filing

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JF
HRL

RICK FUTIA,

Plaintiff,

v.

DWAYNE DOWNING and
LINDA DOWNING, as Trustees, and
HAZEL MALMIN and HAZEL
E. MALMIN, as Trustees,

Defendants.

Case No. CV-10-1034
Civil Rights

COMPLAINT FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF AND
DAMAGES: DENIAL OF CIVIL RIGHTS AND
PUBLIC FACILITIES TO PHYSICALLY
DISABLED PERSONS (CIVIL CODE §§ 54,
54.1 AND 55; INJUNCTIVE RELIEF PER
TITLE III, AMERICANS WITH DISABILITIES
ACT OF 1990

Plaintiff, Rick Futia, alleges:

FIRST CLAIM FOR RELIEF: DAMAGES AND INJUNCTIVE RELIEF
FOR DENIAL OF FULL AND EQUAL ACCESS TO A PUBLIC ACCOMMODATION:
PUBLIC FACILITIES AT A RESTAURANT (Civil Code §§ 51, 54.1)

1. Plaintiff does not have the substantial use of his legs and is a "person with a disability" and "physically handicapped person". Plaintiff requires the use of a wheelchair for locomotion and is either unable to use portions of public facilities which are not accessible to disabled

1 persons who require the use of a wheelchair or is only able to use such portions with undue
2 difficulty.

3 2. The "Live Oak Kitchen", restaurant located at 15531 Union Avenue, Los Gatos, California
4 (the Restaurant) is a Restaurant which is open to the public. Defendants own, operate and/or
5 lease the Restaurant or the land on which it sits.

6 3. Summary of facts: This case involves the denial of accessible parking and sanitary facilities
7 to Plaintiff and others similarly situated at the Restaurant on November 9 and December 16,
8 2009, and on March 8, 2010 (the Dates). Plaintiff was denied equal protection of the law and
9 was denied Civil Rights under both California law and federal law, as hereinbelow described.
10 Plaintiff was denied his rights to full and equal access at the Restaurant because of an
11 inaccessible men's restroom, all of which made the Restaurant not properly accessible to
12 Plaintiff or to others similarly situated. Plaintiff seeks injunctive relief to require Defendants to
13 remove the barriers, to comply with ADAAG and the CBC where required, to remove all
14 barriers to access which are readily achievable, to make all reasonable accommodations in
15 policy in order to enable Plaintiff and others similarly situated to use the Restaurant and at
16 minimum, to use readily achievable alternative methods to enable Plaintiff to use the goods and
17 services which the Restaurant makes available to the non-disabled public. Plaintiff also seeks
18 the recovery of damages for his personal damages involved in the discriminatory experiences
19 on the Dates, and seeks recovery of reasonable attorney's fees and litigation expenses and costs
20 according to statute.

21 4. Jurisdiction: This Court has jurisdiction of this action pursuant to 28 USC § 1331 for
22 violations of the Americans with Disabilities Act of 1990, 42 USC 12101 et seq. Pursuant to
23

1 supplemental jurisdiction, attendant and related causes of action arising from the same facts are
2 also brought under California law, including but not limited to violations of California Civil
3 Code §§ 51, 54, 54.1 and 55.

4 5. Venue: Venue is proper in this Court pursuant to 28 USC 1391(b) and is founded on the fact
5 that the location where Plaintiff experienced his discrimination is located in this district and
6 that Plaintiff's causes of action arose in this district.

7 6. Intradistrict: This case should be assigned to the San Jose intradistrict because the incident
8 occurred in, and Plaintiff's rights arose in, the San Jose intradistrict.

9 7. The Restaurant is a "public accommodation or facility" subject to the requirements of
10 California Civil Code § 51, 54, 54.1 and 55.

11 8. Placeholder.

12 9. Defendants are and were the owners, operators, managers, lessors and lessees of the subject
13 Restaurant at all times relevant herein. Plaintiff is informed and believes that each of the
14 Defendants is and was the agent, employee or representative of each of the other Defendants,
15 and performed all acts and omissions stated herein within the scope of such agency or
16 employment or representative capacity and is responsible in some manner for the acts and
17 omissions of the other Defendants in proximately causing the damages complained of herein.

18 10. Plaintiff and others similarly situated are disabled persons who require the use of a
19 wheelchair and are unable to use public facilities on a "full and equal" basis unless each such
20 facility is in compliance with the provisions of the Americans with Disabilities Act of 1990 and
21 the regulations thereof. Under Civil Code §54.1, Defendants were required to comply with the
22 requirements of the Americans with Disabilities Act of 1990 and the federal regulations
23

1 adopted pursuant thereto. The acts and omissions of which Plaintiff complains took place at the
2 Restaurant.

3 11. Civil Code §54, et seq., were enacted to prohibit discrimination against people with
4 disabilities and to encourage the full and free use by people with disabilities of public facilities
5 and other public places. CC §54(c) states that a violation of the Americans with Disabilities
6 Act of 1990 is a "violation of this section"; CC § 54.1(a) states that individuals with disabilities
7 are entitled to "full and equal access" to public accommodations and that such access means
8 that which meets the standards of Titles II and III of the Americans with Disabilities Act of
9 1990 and federal regulations adopted pursuant thereto; CC § 52a states that minimum damages
10 are \$4,000 per occurrence; CC § 54.3 states that minimum damages for discrimination are
11 \$1,000 per occurrence; CC § 54.3 states that a defendant who denies or interferes with a
12 disabled person's rights of access is liable for actual damages and attorneys' fees.

13 12. Health & Safety Code § 19955 was enacted "To ensure that public accommodations or
14 facilities constructed in this state with private funds adhere to provisions of Chapter 7
15 (commencing with § 4450) of Division 5 of Title 1 of the Government Code." Such public
16 accommodations include those which are the subject of this action. On information and belief,
17 Title 24 California Code of Regulations, formerly known as the California Administrative
18 Code, was in effect at the time of construction and of each alteration of work, all of which
19 occurred after July 1, 1982, thus requiring access complying with the specifications of title 24
20 for all such construction and for each such "alteration, structural repair or addition".

21 13. The Restaurant's men's restroom is inaccessible to people in wheelchairs. The condition
22 of the Restaurant's restroom is construction-related, and in its current condition, denies people
23

1 in wheelchairs full and equal access to its features because of inaccessible features inside the
2 restroom, which are in violation of the requirements of the Americans with Disabilities Act.

3 On each of the Dates, Plaintiff patronized the Restaurant, and either (1) personally
4 encountered and was subjected to such violations, causing Plaintiff to experience difficulty,
5 discomfort and embarrassment and/or (2) knew of such violations, intended to use the restroom,
6 and was dissuaded from attempting to use the restroom because of the violations.

7 As a result, Plaintiff was humiliated and embarrassed, all to Plaintiff's damages in an
8 amount according to proof.

9 14. Defendants' failure to have accessible sanitary facilities, remove all readily achievable
10 barriers, institute policies in furtherance of accessibility or at least have an alternate policy to
11 enable Plaintiff to use the goods and services offered to the non-disabled public without having
12 to suffer the indignities, as aforesaid, was a violation of the California Building Code, the
13 Americans with Disabilities Act and federal regulations adopted pursuant thereto, and as a
14 consequence, was a violation of Civil Code §§54, et seq.

15 15. Injunctive relief: Plaintiff seeks injunctive relief to prohibit the acts and omissions by
16 Defendants at the Restaurant as stated above which appear to be continuing, and which have the
17 effect of wrongfully excluding Plaintiff and others similarly situated from using the Restaurant.
18 Plaintiff frequently travels within a short distance of the Restaurant, and thus will either
19 continue to use the Restaurant or will refrain from using the Restaurant until the barriers are
20 removed. Such acts and omissions are the cause of humiliation and mental and emotional
21 suffering of Plaintiff in that these actions continue to treat Plaintiff as an inferior and second
22 class citizen and serve to discriminate against Plaintiff on the sole basis that Plaintiff is a person
23

1 with a disability and requires the use of a wheelchair for movement in public places. Plaintiff is
2 unable so long as such acts and omissions of Defendants continue, to achieve equal access to
3 and use of this public facility. The acts of Defendants have proximately caused and will
4 continue to cause irreparable injury to Plaintiff if not enjoined by this Court.

5 16. Damages: As a result of the denial of equal access to the Restaurant and due to the acts and
6 omissions of Defendants and each of them in owning, operating and/or leasing the Restaurant,
7 Plaintiff suffered a violation of Civil Rights including but not limited to rights under Civil Code
8 §§ 54 and 54.1, and suffered mental and emotional distress, embarrassment and humiliation, all
9 to Plaintiff's damages. Defendant's actions and omissions to act constituted discrimination
10 against Plaintiff on the sole basis that Plaintiff was physically disabled and unable to use the
11 facilities on a full and equal basis as other persons. Plaintiff seeks the minimum damages of
12 \$4,000 pursuant to CC § 52a, and \$1,000 pursuant to CC § 54.3, for each of the dates that he
13 patronized the Restaurant and for other subsequent dates when he would have patronized the
14 Restaurant but refrained from doing so because of its barriers.

15 17. Fees and costs: As a result of Defendant's acts, omissions and conduct, Plaintiff has been
16 required to incur attorney's fees, litigation expenses, and costs as provided by statute, in order
17 to enforce Plaintiff's rights and to enforce provisions of the law protecting access for disabled
18 persons and prohibiting discrimination against disabled persons. Plaintiff therefore seeks
19 recovery of all reasonable attorney's fees and costs, pursuant to the provisions of Civil Code §§
20 54.3. Additionally, Plaintiff's lawsuit is intended not only to obtain compensation for damages
21 to Plaintiff, but also to force the Defendants to make their facilities accessible to all disabled
22 members of the public, justifying "public interest" attorney's fees, litigation expenses and costs
23

1 pursuant to Code of Civil Procedure § 1021.5.

2 18. Wherefore, Plaintiff asks this Court to preliminarily and permanently enjoin any continuing
3 refusal by Defendants to comply with the requirements of the Americans with Disabilities Act
4 of 1990 and regulations adopted pursuant thereto with respect to access of disabled persons to
5 the Restaurant; for statutory damages pursuant to CC § 54.3; for actual and treble damages
6 pursuant to CC § 54.3 and for attorneys' fees and costs pursuant to CC §§ 54.3 and 1021.5.

7
8 **SECOND CLAIM FOR RELIEF:**
9 **VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990**
10 **42 USC §§ 12101 FF**

11 19. Plaintiff realleges the allegations of paragraphs 1-18 hereof.

12 20. Pursuant to law, in 1990 the United States Congress made findings per 42 USC §12101
13 regarding physically disabled persons, finding that laws were needed to more fully protect
14 "some 43 million Americans [with] one or more physical or mental disabilities"; that
15 "historically society has tended to isolate and segregate individuals with disabilities"; and that
16 "such forms of discrimination against individuals with disabilities continue to be a serious and
17 pervasive social problem"; that "the Nation's proper goals regarding individuals with disabilities
18 are to assure equality of opportunity, full participation, independent living and economic self
19 sufficiency for such individuals"; and that "the continuing existence of unfair and unnecessary
20 discrimination and prejudice denies people with disabilities the opportunity to compete on an
21 equal basis and to pursue those opportunities for which our free society is justifiably famous ..."

22 21. Congress stated as its purpose in passing the Americans with Disabilities Act (42 USC
23 §12101(b)):

It is the purpose of this act

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, ***enforceable standards*** addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal government plays a central role in enforcing the standards established in this act on behalf of individuals with disabilities; and

(4) to invoke the sweep of Congressional authority, including the power to enforce the 14th Amendment and to regulate commerce, in order to address the major areas of ***discrimination faced day to day*** by people with disabilities (emphasis added).

22. As part of the Americans with Disabilities Act, Public Law 101-336 (hereinafter the "ADA"), Congress passed "Title III - Public Accommodations and Services Operated by Private Entities" (42 USC 12181 ff). Among "private entities" which are considered "public accommodations" for purposes of this Title is a Restaurant (Regulation 36.104).

23. Pursuant to §302, 42 USC §12182, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases or leases to, or operates a place of public accommodation."

24. Among the specific prohibitions against discrimination were included:

§12182(b)(2)(A)(ii): "A failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities ...";

§12182(b)(A)(iii): "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied service, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services ..."; ***§12182(b)(A)(iv)***:

1 "A failure to remove architectural barriers and communication barriers that are structural in
2 nature, in existing facilities ... where such removal is readily achievable"; §12182(b)(A)(v):

3 "Where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily
4 achievable, a failure to make such goods, services, facilities, privileges, advantages, or
5 accommodations available through alternative methods if such methods are readily achievable".

6 The acts and omissions of Defendants set forth herein were in violation of Plaintiff's rights
7 under the ADA, Public Law 101-336, and the regulations promulgated thereunder, 28 CFR Part
8 36ff.

9 25. The removal of each of the barriers complained of by Plaintiff as hereinabove alleged, were
10 at all times herein mentioned "readily achievable" under the standards of the Americans With
11 Disabilities Act. Because the Restaurant was not accessible, Defendants had an obligation to
12 have some sort of plan which would have allowed Plaintiff to enjoy the Restaurant's goods and
13 services without having to suffer the indignities as aforesaid.

14 26. Pursuant to the Americans with Disabilities Act, 42 USC 12188ff, §308, Plaintiff is
15 entitled to the remedies and procedures set forth in §204(a) of the Civil Rights Act of 1964, 42
16 USC 2000(a)-3(a), as Plaintiff is being subjected to discrimination on the basis of disability in
17 violation of this Title or has reasonable grounds for believing that he is about to be subjected to
18 discrimination in violation of §12182. On information and belief, Defendants have continued
19 to violate the law and deny the rights of Plaintiff and of other disabled persons to access this
20 public accommodation since on or before the Dates. Pursuant to §12188(a)(2), "In cases of
21 violations of §12182(b)(2)(A)(iv) ... injunctive relief shall include an order to alter facilities to
22 make such facilities readily accessible to and usable by individuals with disabilities to the
23

1 extent required by this title."

2 27. Plaintiff seeks relief pursuant to remedies set forth in §204(a) of the Civil Rights Act of
3 1964, (42 USC 2000(a)-3(a), and pursuant to Federal Regulations adopted to implement the
4 Americans with Disabilities Act of 1990. Plaintiff is a person for purposes of Section 12188(a)
5 of the ADA who is being subjected to discrimination on the basis of disability in violation of
6 Title III and who has reasonable grounds for believing he will be subjected to such
7 discrimination each time that he may attempt to patronize the Restaurant.

8 Wherefore Plaintiff prays for relief as hereinafter stated:

9 PRAYER

10 1. Issue a preliminary and permanent injunction directing Defendants to modify its
11 facilities as required by law to comply with the ADAAG and the CBC where required, remove
12 all barriers where it is readily achievable to do so, institute policies in furtherance of
13 accessibility or at least have an alternate policy to enable Plaintiff to use the goods and services
14 offered to the non-disabled public so that it provides adequate access to all citizens, including
15 persons with disabilities; and issue a preliminary and permanent injunction directing
16 Defendants to maintain its facilities usable by plaintiff and similarly situated persons with
17 disabilities in compliance with federal regulations, and which provide full and equal access, as
18 required by law;

19 2. Retain jurisdiction over the Defendants until such time as the Court is satisfied that
20 Defendants' unlawful policies, practices, acts and omissions, and maintenance of inaccessible
21 public facilities as complained of herein no longer occur, and will not recur;

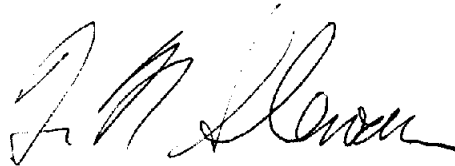
22 3. Award to Plaintiff all appropriate damages, including but not limited to statutory
23

1 damages, treble damages, general damages and special damages in an amount within the
2 jurisdiction of the Court, all according to proof.

3 4. Award to Plaintiff all reasonable attorneys' fees, all litigation expenses, and all costs
4 of this proceeding as provided by law; and

5 5. Grant such other and further relief as this Court may deem just and proper.

6 Date: March 9, 2010

7
8 

9 S/Thomas N. Stewart, III
10 Attorney for Plaintiff
11
12
13
14
15
16
17
18
19
20
21
22
23